Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

No. 77-1641

FRANK PAUL GIUSTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States

Your petitioner, Frank Paul Giusto, respectfully prays that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the Third Circuit entered in the above entitled case on April 24, 1978 which judgment affirmed a judgment of sentence of the United States District Court for the District of New Jersey filed February 7, 1977.

CITATIONS TO OPINIONS BELOW

Petitioner's sentence and conviction were affirmed by an unreported judgment order and opinion of the Court of Appeals for the Third Circuit which is printed in Appendix A, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the trial court commit reversible error in determining that petitioner voluntarily consented to the search of his property?

2. Did the trial court err in its failure to require the Government to show a reason for not availing itself of the opportunity to apply for a search warrant?

3. Should the Government not be held to a higher burden of proof in justifying a warrantless search when lack of opportunity to apply for a search warrant was not clearly shown?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this petition is the Fourth Amendment of the United States Constitution which is printed in Appendix B, *infra.*

STATEMENT

On October 28, 1975 special agents of the FBI entered into a farm belonging to the petitioner, Frank Paul Giusto, said farm being located in Manalapan Township, New Jersey. In addition to FBI agents there were members of the local police department and a surveillance airplane operated by the FBI flying overhead. Neither the special agents of the FBI nor the local police nor any other law enforcement authorities had applied for nor received a search warrant to search the person, premises or possessions of the petitioner. The FBI investigation which included the entry into the petitioner's farm was undertaken in connection with a theft of pharmaceuticals which had occurred approximately two weeks earlier in eastern Pennsylvania. Special agents of the FBI identified themselves to the petitioner and ultimately searched buildings located on the farm. Pharmaceuticals were located in a building on the farm and were identified by the agents as being stolen in the theft some two weeks earlier.

Petitioner was indicted by the Grand Jury for the District of New Jersey and motion to suppress evidence was filed and denied by the District Court. Grounds for the denial were on the basis that petitioner had consented to the search of his premises.

In November of 1976 petitioner and three (3) co-defendants were tried before the United States District Court and a jury and were convicted of conspiracy and receiving goods stolen in interstate shipment.

Sentence was imposed in February of 1977 and appeal was taken to the Court of Appeals for the Third Circuit which was affirmed on April 24, 1978.

While there was a substantial divergence of testimony elicited during the motion to suppress evidence seized on petitioner's farm, it is clear from the testimony presented that no search warrant was applied for and none was issued. It is further clear and has been conceded by the Assistant United States Attorney during the motion that the basis upon which the Government resisted the motion to suppress was that the search was consented to by petitioner. There was no allegation of any exigent circumstances or any other acceptable exceptions to the provisions of the Fourth Amendment that no search shall be conducted without appropriate warrant. It is apparent from the testimony that the special agents for the FBI chose as a tactic of the investigation not to apply for a search warrant. There were approximately twelve to fourteen agents present on the farm confronting the petitioner and making inquiries as to whether or not they could search the farm. A denial of any consent was testified to by petitioner and it was further testified to by special agents of the FBI that a lock and hasp was in fact broken in an attempt to enter the building on the premises which the petitioner testified he had no access to. That building contained the goods alleged to have been stolen.

REASONS FOR GRANTING THE WRIT

In *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), this Court made it clear that probable cause alone is not sufficient for a warrantless search and seizure without a distinct justification such as exigent circumstances to validate that warrantless intrusion. It should be made absolutely clear that the judicially sanctioned exceptions to the requirement of a search warrant do not exist as interchangeable alternatives to be considered as possible methods of conducting an investigation. *Terry v. Ohio,* 392 U.S. 1 (1968). It is clear from a reading of the decisions of this Court that if a search warrant can be applied for and procured such application must be made. There is no alternative. Merely because it is convenient for law enforcement to choose a different route to avoid the complex questions otherwise involved in applying for a search warrant does not justify a warrantless search.

In the case at bar there has been absolutely no showing by the Government that there was any justification for their not applying for a search warrant. It is sophistry to argue that they could have known someone would have consented to a search of the petitioner's farm before they went into his premises. There being no exigent circumstances in view of the large amount of pharmaceuticals found in a building on the premises, and there being no other testimony concerning any other possible exceptions to the general rule requiring application for warrant, it can readily be seen that the only other alternative that hindsight would render operable in this case is to testify before the District Court that in fact "consent" had been obtained to search the premises. The Government clearly did not satisfy its burden of proof on the issue of consent.

The Government's burden is to show clearly that the defendant's consent was, in fact, freely and voluntarily given. *Bumper v. North Carolina,* 391 U.S. 543 (1968). Clear and positive testimony that consent is unequivocal, specific, freely and intelligently given must be produced. *Judd v. United States,* 190 Fed. 2nd 649 (1957). A mere acquiescence to lawful authorities is not sufficient. *Judd, supra.* The surrounding circumstances must be examined to test the voluntariness of consent and account must be taken of the subtlety of coercive police questioning as well as the possibly vulnerable subjective state of the person who consents. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1972).

The trial court failed to require the Government and in fact failed to take into consideration any of the facts and surrounding circumstances of the intrusion upon petitioner's property. The District Court was concerned only with the issue of whether or not consent had been granted, and only relied upon a narrow interpretation of the words allegedly spoken during the confrontation between the special agents of the FBI and the petitioner admittedly just beyond the front door of his home well within the boundaries of the farm.

No requirement was placed upon the Government to show why no warrant had been applied for and virtually no weight was given to the manifestly oppressive effect of the number of officers confronting petitioner under the circumstances.

This would be an appropriate case to re-examine the entire concept of warrantless searches as they apply to the so-called "informed consent to search".

It also affords the opportunity to put to rest the question of whether or not law enforcement agencies have an obligation to apply for a search warrant and under what circumstances that obligation arises.

CONCLUSION

For these reasons certiorari should be granted to clarify these most important issues concerning one of the most jealously guarded constitutional rights of our citizens.

Respectfully submitted,

s/ Michael D'Alessio, Jr.
Attorney for Petitioner

APPENDIX A

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 77-1303, 77-1322, 77-1345/46

UNITED STATES OF AMERICA

v.

FRANK PAUL GUISTO

Appellant in No. 77-1303

v.

JACK SILBERBERG,

Appellant in No. 77-1322

v.

LIEB SILBERBERG,

Appellant in No. 77-1345

v.

CHARLES CAMAROTA,

Appellant in No. 77-1346

Appendix A

On appeal from the United States District Court for the District of New Jersey

Crim. Nos. 76-118-1/2/3/4

Submitted Under Third Rule 12(6)
February 24, 1978

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges* and BECHTLE, *District Judge.**

JUDGMENT ORDER

After consideration of all contentions raised by appellants, namely, that (1) there was insufficient evidence to sustain the conviction of Charles Camarota since the government failed to offer any in-court identification evidence linking Camarota with the crime with which he was charged; (2) the government failed to meet its burden of proof in that it did not establish beyond a reasonable doubt the identity of Camarota as the perpetrator of the crime; (3) Camarota was denied his right to due process because he was precluded from taking the stand in his own defense; (4) the trial court violated Rule 605 of the Federal Rules of Evidence by making comments about its prospective sentencing of Berkoff;[1] (5) Leib Silberberg was denied the right

* Hon. Louis C. Bechtle, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1. Although there is serious question about the appropriateness of the statement by the trial judge regarding the type of sentence to be imposed on the witness, in the factual context here we do not believe it is reversible error.

Appendix A

to take the stand on his own behalf; (6) the trial court erred in its instruction to the jury on the conspiracy count, for it did not instruct the jury that there must be knowledge or some culpable mental state with respect to the act of stealing goods; (7) Jack Silberberg was denied his right to present a defense or to testify in his own behalf by the ruling of the district court to the effect that if the appellant so testified, the prosecutor could cross-examine him as to his earlier exercise of his Fifth Amendment right to silence at the time he was summoned to the grand jury; (8) the statement attributed to Jack Silberberg should have been suppressed because it was improperly obtained by the government's agents, or at the least, the jury should have been charged that it should evaluate the voluntariness of the statement; and (9) the trial court reversibly erred in determining that Guisto voluntarily consented to the search of his farm, and in denying Guisto's motion to suppress the resulting evidence, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ Arlin M. Adams
Circuit Judge

ATTEST:

s/ M. Elizabeth Ferguson
Chief Deputy Clerk

DATED: April 24, 1978

APPENDIX B

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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OCTOBER TERM, 1978

FRANK PAUL GIUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1641

FRANK PAUL GIUSTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in finding that he consented to the search of his premises.

1. Following a jury trial in the United States District Court for the District of New Jersey, petitioner, together with his three co-defendants, was convicted of conspiracy to possess and possession of goods stolen from an interstate shipment, in violation of 18 U.S.C. 659 and 371. Petitioner was sentenced to concurrent five year terms of imprisonment. The court of appeals affirmed (Pet. App. A).

On October 15, 1975, a tractor-trailer containing a million-dollar shipment of pharmaceuticals destined for Missouri was stolen at gunpoint from a truckyard in Pennsylvania and brought to petitioner's farm in Manalapan, New Jersey. On October 28, following an

investigation, this farm became the subject of F.B.I. surveillance. F.B.I. agents in a surveillance plane observed petitioner and his co-defendants loading cartons of drugs into a van from a shed on petitioner's farm. When petitioner spotted the plane, his co-defendants departed leaving the van on the farm (I Tr. 1.51-1.55, 1.68, 1.73-1.77; II Tr. 2.06-2.15, 2.29-2.34; IV Tr. 4.65, 4.71-4.80; I S.Tr. 11-12).[1]

At that point, several agents drove up to the farm and encountered petitioner standing under a tree scanning the sky with binoculars (S.Tr. 6). Agent Colitre, who was in charge, identified himself and informed petitioner that the agents wanted to conduct a search, but that they did not have a search warrant and would not conduct a search without petitioner's permission (I S.Tr. 7). The agents told petitioner that they had reason to believe that there was stolen property on the farm and that the agents wished to search for this property. Petitioner replied that they could go ahead and search the farm (I. S.Tr. 6-8). When the agents came to the shed, they asked petitioner for a key to a padlock on its doors. Petitioner replied that he rented the shed to someone else and did not have a key. When asked for the name of the renter, petitioner first said that he did not know his name and then said that he had rented the building on a monthly basis to a man named Martin, whose last name he did not know, that he had not seen him in several months, and that Martin paid his rent in cash. Petitioner could not describe the alleged renter (I S.Tr. 24). After the agents told petitioner that they found it hard to believe that he had rented the shed, petitioner responded "[w]ell it's all right

[1]"S.Tr" refers to the transcript of the hearing on the motion to suppress, and "Tr." refers to the trial transcript.

with me if you go ahead and look into the building" (I. S.Tr. 24-25). One agent then removed the lock and entered the shed (I. S.Tr. 25-26). The shed contained hundreds of cartons of the stolen drugs (I. S.Tr. 26).

Prior to trial, the search of petitioner's farm was the subject of a suppression motion and hearing. Petitioner denied that he had given the agents permission to conduct a search. He claimed that he had asked them if they had a warrant to look around, that they replied "no, we don't," and that they then proceeded to search the farm. He also testified that he had rented the shed to a Mr. Martin (II S.Tr. 62-71, 87-88). At the conclusion of the hearing, the district court, finding Agent Colitre's testimony to be truthful and petitioner's testimony "incredible," found that petitioner had consented to the search of his premises (II S.Tr. 177).

2. There is no merit to petitioner's contention that the district court erred in finding that he consented to the search of his shed. That finding is amply supported by the agents' testimony at the suppression hearing; the district court expressly credited that testimony and discredited that of petitioner.

Petitioner offers no reasons based on the record for disputing the district court's finding. He merely argues (Pet. 5-6) that the search was without a warrant and there were no exigent circumstances. But it has long been established that a warrantless search conducted pursuant to a valid consent is constitutionally permissible. See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411, 424; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222.

The record also belies petitioner's claim (Pet. 6) that he merely acquiesced to lawful authority. Unlike the situation in *Bumper* v. *North Carolina*, 391 U.S. 543, upon which petitioner relies, the agent here gave petitioner a clear

choice when he told him that no search would be conducted if petitioner did not give his permission. It was proper for the district court, as the fact finder, to accept Agent Colitre's version of the facts while rejecting petitioner's version. This ruling was not clearly erroneous. See *Government of Virgin Islands* v. *Gereau*, 502 F. 2d 914, 926-927 (C.A. 3), certiorari denied, 420 U.S. 909.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

DOJ-1978-08